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MAR 26 1965
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 839

GEORGE NEFF ROWE,
Petitioner,

v.

THE UNITED STATES,
Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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It is not petitioner's intention to deal in minutiae in this Reply to the Brief for the United States in Opposition. It is assumed that with the petition, opposition, and record before them, the honorable Justices will not be misled as to the applicable facts and, more importantly, as to the significance of the issues.

The Solicitor recognizes that an issue is whether an Undesirable Discharge constitutes punishment. Except for a New York case, *Matter of Nistal* v. *Hausauer*, 38 N.Y. 1946, 154, 124 N.E. 2d 94, 98, *cert. denied*, 349 U.S. 962 (involving a discharge from the National Guard by a State Governor prior to the Uniform Code of Military Justice), the cases cited by the Solicitor arose over

a half century ago, or in the case of *Grant* v. *U.S.* (C.Cls. No. 30-62, decided July 12, 1963) did not involve an Undesirable Discharge. Indeed, when *Reid* v. *United States*, 161 Fed. 469, reached this Court on a writ of error, jurisdiction was refused on the grounds that the amount involved was less than $3,000, with no opinion being expressed as to merits of Reid's claim, 211 U.S. 529 (1909).

The petitioner finds quite surprising that the Solicitor apparently sees no conflict between the opinions such as *Reid* v. *U.S.*, *supra; Jackson* v. *U.S.*, C.Cls 1962, 297 F.2d 939; *Grant* v. *U.S.*, *supra;* and *Brown* v. *U.S.*, C. Cls. 1960, 150 C.Cls. 836, on one hand and on the other hand opinions such as *Clackum* v. *U.S.*, C.Cls. 1960, 296 F.2d 228; *Murray* v. *U.S.*, C.Cls. No. 237-57, decided June 7, 1961; *Bland* v. *Connally*, C.C.A.D.C. 1961, 293 F.2d 852; *David* v. *Stahr*, C.C.A.D.C. 1961, 293 F.2d 860; and *Sofranoff* v. *U.S.*, C.Cls. No. 9-62, decided April 17, 1964. The latter cases, particularly *Clackum* and *Bland*, leave no room for doubt but that the undesirable type of discharge was considered punitive in nature.

The only modern citation by the Solicitor in note 2 on page 6: the article *Sentence First—Verdict Afterwards: Dishonorable Discharges Without Trial by Court-Martial?* by Robert Pasley, is of little comfort to him. The article deals with the legality of the dishonorable discharges given to the Korean turncoats by administrative fiat. Pasley indicates certain legal differences between the dishonorable discharges awarded by a court-martial and the undesirable discharges awarded administratively, but he acknowledges that the practical effect of each discharge in the eyes of the public is approximately the same. He quotes doubts attributed to Winthrop as to the legality of the forerunner of the Undesirable Discharge, that is, the Discharge without Honor.

The Solicitor fails completely to oppose petitioner's contention that alcoholism is a disease and therefore a

physical disability under the applicable Air Force regulations. This case is unique in that the only evidence which the Air Force had during the petitioner's current enlistment upon which to base the Undesirable Discharge were those episodes for which the petitioner had already been punished under the Uniform Code of Military Justice (often beyond the maximum limits of the Code). Take these away, not only was the petitioner's service good but there is affirmative evidence from the individuals who sought his discharge to the effect that it was excellent.

Petitioner is not contesting the right of the Air Force to discharge him at any time. What he contests is the legality of any discharge which at the same time punishes or of a discharge for a physical disability without opportunity for the statutory full and fair hearing on the germane issues.

The Solicitor seems not to understand that the regulations pursuant to which the petitioner was given his Undesirable Discharge plainly prescribed not one, but two physical examinations—one for the commander recommending the discharge in the first instance and another for the board which considered same. While the petitioner may have received the former (however carelessly accomplished it may have been), he certainly did not receive the latter.

The Solicitor attempts to excuse the sketchy nature of petitioner's examination and report which, among other things, forgot even to mention petitioner's splenectomy—a thirty percent disability under the Veterans Administration Schedule for Rating Disabilities—on the grounds that such ratings are based upon statutes, regulations and policies far different from those governing retirement or discharge. They are, of course, different. But how far different is another matter. The Veterans Administration ratings are based as far as practicable upon the

average impairment of the earning capacity resulting from the injuries in civilian occupations. In this light, it is clear that a thirty percent disability can hardly be stated to be minimal even insofar as the military is concerned. And the responsibility to make the "conclusive determination" that a mental or physical defect did not exist which would warrant petitioner's consideration for retirement or separation by reason of physical disability was for officials aside from the medical officer. While it is probable that the medical officer was not aware of petitioner's splenectomy or he would have mentioned it in his report, it is almost a certainty that the petitioner's commander or the board could hardly have been aware of such disability if not reported by the medical officer.

The truth of the matter is that the record as a whole discloses a slipshod and arbitrary treatment of the petitioner from first to last.

The case not only contains important questions which are ripe for consideration by this Court but also presents a good test case in that the facts are relatively clean with few areas for equivocation.

Petitioner contends that the time has come to wipe out the involuntarily issued Undesirable Discharge. Punishment of this severity should be dispensed with the safeguards of the Uniform Code of Military Justice or not at all. In this respect, petitioner's situation is far from unique. Even where the Uniform Code of Military Justice contemplates no punitive discharge and still affords considerable protection of the basic rights of servicemen, administrative means are being utilized daily for the issuance of derogatory discharges every bit as odious and, for all practical purposes, as punitive as those issued by court-martial. The standards are vague and rudiments of fair play fall far short of those imposed by the Uniform Code of Military Justice. Yet by such

prescription, thousands of young men are yearly being returned to their communities under a label of dishonor and are severely handicapped in their future adaptability and usefulness to society. Indeed, petitioner questions the constitutionality of such discharges, per se.

Many prominent authorities have expressed doubt as to the legality of the procedure. Its harsh effects should not be ignored and it is submitted that questions of fundamental importance are involved. It is an evil of which this Court should take cognizance.

Respectfully submitted,

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